INJUNCTION — SUSPENSION OF OPERATIVE FORCE PENDING APPEAL. — An order granting an injunction concluded with the following words: "The injunction will not be in effect until the expiration of 30 days from the filing of this order, and will then be in effect if no appeal is then perfected to the supreme court." An appeal from this order was perfected within the thirty days and a motion was then made to dismiss the appeal on the ground that there was no injunction nor final order from which an appeal would lie: *Held,* that the order "never had any force or effect as a live order granting an injunction, because the right to an injunction never accrued under it," and the motion was sustained. *Porter* v. *Speno et al.* (1907), — Idaho —, 92 Pac. Rep. 367.

A dissenting opinion maintained that the decree should be construed as a whole, that its whole force and effect was to retain the parties in statu quo until a final decision on appeal, and that such an order as this lay within the discretion of the trial court. There seems to be no conflict among the English and American authorities on this point, the cases all holding in accord with the dissenting opinion that, whenever it appears that suspending the operation of a decree pending an appeal will work justice to the parties, an order to that effect may be made. *Mayor, etc.,* v. *Wood* (1843), 3 Hare 131, 152; *Scholey* v. *Central Railway of Venezuela* (1866), 14 Week. Rep. 786; *Walford* v. *Walford* (1868), 19 L. T. (N. S.) 233; *Forbush* v. *Bradford* (1858), Fed. Cas. No. 4930; *Ewing* v. *Filley* (1862), 43 Pa. (7 Wright) 384; *Disbro* v. *Disbro* (1869), 37 How. Prac. 147; *Genet* v. *The President & D. & H. C. Co.* (1889), 113 N. Y. 472; *Pach* v. *Geoffroy* (1892), 19 N. Y. Supp. 583; *Sammons* v. *Gloversville* (1901), 70 N. Y. Supp. 284; 22 CYC. 970.

JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.—S., claiming to have made a valid contract for purchase of land, and being in possession, brought an action in equity for specific performance of his contract; H., plaintiff herein, appeared and defended, denying the contract sued on, and also filed a cross-bill, asking that title to the land be quieted in him, and for judgment against S. for the value of the use, rents and profits of the land while in his possession. Upon trial in the district court the validity of S.'s contract was confirmed, a decree was entered for specific performance thereof, and H.'s cross-bill was *dismissed.* Upon appeal, the decree of the lower court was reversed (*Smith* v. *Hogle,* 116 Iowa 645, 88 N. W. 820), and when the case came up again in the district court a decree was entered therein against S. dismissing his petition, and for costs, but no mention was made of the cross-bill. H. now brings an action at law for rents and profits of the premises, and S., having died in the meantime, his administratrix appeared and answered, pleading the record in the former case as a prior adjudication. *Held* (WEAVER, C.J., dissenting), that H., having filed his cross-bill and not having withdrawn the same before final decree, was barred from bringing a subsequent action for rents and profits, whether the lower court was in error or not in failing to render judgment for him upon the cross-bill in the suit for specific performance. *Hogle et al.* v. *Smith* (1907), — Ia. —, 113 N. W. Rep. 556.

The principal case raises a very nice question, but it is believed that, notwithstanding the vigorous dissenting opinion, the holding of the court is supported in principle and by the better reasoned decisions. No doubt the claim in the cross-bill was not allowed through an oversight; nevertheless the case went to final decree, and the dismissal of a bill in equity stands upon the same footing as a final judgment at law, i. e., it is presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined. 1 FREEMAN JUDG. (4th ed.), 486; 2 SMITH'S LEAD. CAS., 667; *Case* v. *Beauregard,* 101 U. S. 688. Nor can the force of a judgment as res judicata be impaired by a showing that it was clearly erroneous. FREEMAN JUDG. (4th ed.), § 252; *Gordon* v. *Ware Nat. Bank,* 132 Fed. 444, 67 L. R. A. 550. True, there is no specific reference to the cross-bill in the final decree, but as it stood it was tantamount to a dismissal. In the present case the plaintiff is attempting to recover upon the same demand which he pleaded as a *set-off* in his cross-bill, and the former judgment is set up as an estoppel against the prosecution of a second action upon the *same cause of action.* This important fact is apparently forgotten by WEAVER, C.J.; for, in dissenting, he grounds himself upon the proposition enunciated in *Russel* v. *Place,* 94 U. S. 606, 24 L. Ed. 214, as decisive of the present case. It was there decided that when it appears from the record of the proceedings in a former case that several distinct issues have been joined or litigated, on one or more of which the judgment in question may have passed, without indicating upon which it was entered, the parties are not conclusively estopped thereby, and the uncertainty may be removed by extrinsic evidence. As a general proposition this is undisputed. (See ROSE'S NOTES ON U. S. REPORTS, 9:160 ff), but its application is limited to cases in which a judgment is pleaded as an estoppel in another suit between the same parties upon a *different* cause of action. On the other hand, where the causes of action are the same, a former judgment is conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of litigation. FREEMAN, JUDG. (4th ed.), § 249; *Cromwell* v. *County of Sac,* 94 U. S. 391. Such is the present case, and it would seem that there is little doubt as to the correctness of its holding. Of course a defendant is not obliged to plead his set-off, and does not lose his right to bring a subsequent action by failing to plead it. *Seventh Day Adventist Ass'n* v. *Fisher,* 95 Mich. 274, 54 N. W. 759; *Axtel* v. *Chase,* 83 Ind. 546; *Minor* v. *Walter,* 17 Mass. 237; *Cook* v. *Brown,* 125 Mass. 503, 28 Am. St. Rep. 259. And if the defendant pleads his set-off, but the records show that the court excluded all evidence with regard thereto, the judgment cannot be used as an estoppel in an action by the defendant for the same set-off. *Hobbs* v. *Duff,* 23 Cal. 596; *Haas* v. *Taylor,* 80 Ala. 459; *Wright* v. *Miller,* 147 N. Y. 362. Mr. Freeman states that the same rule prevails where, instead of the court's excluding evidence, the defendant failed to present any proof in support of his set-off. FREEMAN JUDG. (4th ed.), § 278; *Garrot* v. *Johnson,* 11 Gill & J. 173, 35 Am. Dec. 272. No other decision has been found which supports this position and it seems to be against the weight of authority. On

the contrary, it has been expressly held that, if the defendant allows final judgment to be entered without withdrawing his set-off, he is estopped from bringing another action for the same. *Reynolds* v. *Reynolds,* 3 Ohio 268; *Janney* v. *Smith,* 2 Cranch C. C. 499; *Eastmure* v. *Laws,* 7 Smith 461; *Peack* v. *Mills,* 14 Vt. 371; *Wright* v. *Salisbury,* 46 Mo. 26; *Clement* v. *Field,* 147 U. S. 467. For, after judgment upon the merits, the parties may not "canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment." *Greathead* v. *Bromley,* 7 Term Rep. 456.

JUDGMENT—FOREIGN JUDGMENT—ENFORCEMENT.—Plaintiff brought action against the executors of S., deceased, upon the record of a judgment obtained against S. in the district court of M. county, territory of Arizona. The record of the case in the Arizona court shows that the defendant S. appeared and answered the complaint, that the case was tried and the cause submitted to the court, which took it under advisement, reserving decision till a future day. It further appeared that defendant S. died before any decision had been rendered or judgment entered, but that subsequently the court ordered that judgment be entered in favor of plaintiff and against defendant, and that "said judgment be entered nunc pro tunc as of the date of submission of said cause." It was objected that the death of S. before entry of judgment deprived the Arizona court of jurisdiction. *Held,* that where a judgment is entered by a court of record in another state after trial before the court in which decision was reserved, and the judgment subsequently entered as of the date of the trial, it may be enforced against the estate of defendant in Pennsylvania, though he dies after the trial and before actual entry of judgment. *Stilwell* v. *Smith et al.* (1907), — Pa. —, 67 Atl. Rep. 910.

The power of the courts, whether of law or equity, to make entries of judgments nunc pro tunc in proper cases is one which has long been exercised as a part of their common law jurisdiction. BLACK, JUDG., § 126; *Lord Mohun's Case,* 6 Mod. 59; *Reid* v. *Morton,* 119 Ill. 118, 6 N. E. 414. This power, therefore, does not depend on statute; it is inherent. *Chissom* v. *Barbour,* 100 Ind. 1. The circumstances which justify the exercise of this power have been well summarized by Justice HARLAN: "Where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience * * * or for any other cause not attributable to the laches of the parties, but within the control of the court, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, 'actus curiae neminem gravabit,' * * * it is the duty of the court to see that the parties do not suffer by the delay." *Mitchell* v. *Overman,* 103 U. S. 62, 26 L. Ed. 369. Thus where one of the parties dies, after the submission of the case, but before judgment is rendered, if the successful party be guilty of no laches, the court will not allow the action to abate, but instead will enter judgment nunc pro tunc as of the time of submission. *Green* v. *Cobden,* 4 Scott's Cas. 486; *Tapley* v. *Goodsell,* 122 Mass. 176; *Long* v. *Stafford,* 103 N. Y. 275, 8 N. E. 522; *Estate of Page,* 50 Cal. 40.